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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH,
Petitioners and Appellants,
vs.
TERRITORY OF HAWAII,
Respondent and Appellee.

No. 195.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF FOR APPELLANTS.

WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
W. O. SMITH,
A. LEWIS, JR.,
C. H. OLSON,
For the Appellants.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH, Petitioners and Appellants, vs. TERRITORY OF HAWAII, Respondent and Appellee.	No. 195. APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF FOR APPELLANTS.

STATEMENT.

Petition in the Supreme Court of the Territory of Hawaii under the laws of the Republic of Hawaii, Chapter 26, Laws of 1894-1895, now found in Revised Laws of Hawaii, 1905, Chapter 129, Secs. 2000-2008. The statute is modeled on the Act of Congress establishing the Court of Claims, and we give in the appendix those sections which define the jurisdiction and procedure.

It is a part of the history of the American people that the American Board of Commissioners for Foreign Missions was one of the manifestations of a new birth of religious life at the end of the Eighteenth and the beginning of the Nineteenth century. Great missionary societies were founded in England

in the last quarter of the Eighteenth Century, while the evangelical revival in America produced amongst its fruits the founding of Andover Seminary, anchored to a Calvanistic creed, the founding of the A. B. C. F. M. by the same men, upon the same principles, and the schism which separated the Congregational churches into the Unitarian and the Orthodox wing. One of the earliest, and distinctively the most successful of the missionary enterprises of the American Board was the Mission to these islands. The men called to its work were of the finest intellectual training, of high spiritual graces, and fired with a consuming zeal for the spread of God's kingdom in savage lands. They were, in their theological views, as Lowell said of the Puritans "narrow as the sword of righteousness is narrow," and the very fire of their zeal was kindled by the contemplation of the contrast between the condition of the lost and the saved soul. Their convictions irresistable compelled them to spread by every means in their power the knowledge of the doctrines set forth in their creed, the acceptance of which they believed to be a condition of salvation. For this reason after having with wonderful success instituted a system of Christian schools, attended by one-third of the nation, they procured in 1835 a gift from some of the chiefs of the Lahainaluna premises for a Mission Seminary, the purposes of which are set forth in its laws adopted and published in the same year, two of which are as follows:

"1. To aid the Mission in accomplishing the great work for which they were sent thither; that is, to introduce and perpetuate the religion of our Lord and Savior Jesus Christ, with all its accompanying blessings, civil, literary and religious."

"4. Another object still more definite and of equal or greater importance, is to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow-laborers with us in disseminating the Gospel of Jesus Christ to their dying fellow-men." (Tr. p. 8.)

By the same laws the whole school met at daylight and sunrise each day for prayer, absence was marked, and the absentee called to account; on the afternoons of Tuesday and Thursday

the whole school met for biblical instruction, embracing the interpretation of the Scriptures, the evidences of Christianity, Archeology and Sacred Geography. Until 1849 the school was continued by the Mission as an institution of higher learning, with direct religious teaching and training in the doctrines held by the Mission (Tr. p. 8).

After the great Mahele by which the feudal or customary titles were turned into legal holdings, and the establishment of the Land Commission, the A. B. C. F. M. applied to establish its titles, including Lahainaluna, but, after introducing evidence, the latter claim was withdrawn, because of the arrangement with the Government, which is the basis of this suit. (Tr. p. 2.) That arrangement, occasioned by financial stress and the feeling that the school had really become a national institution which should be conducted by the Government, (which had become Christian,) at its own expense, but under the care of the Mission, culminated in a vote of the Mission at its annual meeting in April and May, 1849:

"To make over this Seminary to the Government, it being understood that it is to be conducted on the same principles as heretofore." (Tr. p. 2.)

Upon this, the Rev. W. P. Alexander, the Rev. C. B. Andrews and S. N. Castle, Esq., a committee, on April 25th, 1849, addressed a letter of that date to his Excellency Richard Armstrong, Minister of Public Instruction. After reciting the establishment of the institution, with the purpose "to promote the diffusion of enlightened literature and Christianity throughout the islands," the watchful care of the Mission, its unsparing exertions to procure these objects, that usually three, and at all times two, missionaries have been engaged in its work, its fruits scattered throughout the islands, that it had been planted and sustained by the American churches for the spread of the Gospel in heathen lands, the pecuniary embarrassment of the Board which had sustained it, that in view of the danger that this work might suffer for want of pecuniary means, and their belief that the highest interests of the Hawaiian people would be served by its transfer to his Majesty's Government, they propose to trans-

fer the institution, with all philosophical and other apparatus, its libraries, upon the express condition "that the said *institution shall be continued at its expense* as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission which we represent, a summary of which will be found in the confession of faith herewith enclosed." "In case of nonfulfilment or violation of the conditions" the property to revert to the Mission, the government to refund any necessary expense incurred in carrying on the institution while waiting the ratification of the committee, if no ratification be had. Of the confession of faith which was enclosed, and the confession which was substituted in its place, we shall speak hereafter. This letter was submitted to the Privy Council on April 26th, and the proposal accepted, subject to the ratification of the legislature, with the proviso that it should be optional with the Government to allow the institution to revert to the Mission in case of nonfulfilment of the condition, or to pay the sum of $15,000, and with the further important proviso that in case the Government should find it expedient to divert the establishment to other purposes than those of education, it should be at liberty to do so on condition "that it sustain an institution of *like character and on similar principles* in some other place on the islands or pay the sum of $15,000." The sum of $3,000 was appropriated for the support for the ensuing year, and the Minister of Public Instruction was authorized to conduct the seminary. (Tr. p. 12.) These resolutions were communicated to the committee on April 28th, and on the same day were adopted by the Mission (Tr. pp. 13-14), and it was provided that if further conveyance was necessary, such conveyance should be prepared. On the 8th of May, a substitute for the Articles of Faith was presented by the committee which, as the letter transmitting it shows, was intended to create greater restrictions in regard to religious instruction, the committee saying that the previous confession accorded with the belief of the churches sustaining the Mission so far as it went, yet would admit also teachings sub-

versive of Evangelical Christianity, which request was granted by the Government. The differences in the creeds are of the utmost importance from a Calvanistic standpoint, as it excludes alike Romanism, at which it was primarily aimed, and Unitarianism as well. The substituted creed calls for a confession of faith in the Trinity, the Lost Condition of Man, Free Grace, Particular Redemption, Effectual Calling, Everlasting Punishment, Close Communion, and Baptism only for the children of members of the church. It also declares the inspiration of the Scriptures and that they contain a system of Divine Truth for government and that there is a systematic theology. (Tr. pp. 4 and 5.)

The acceptance of the school was ratified by the legislature of Hawaii on July 11th, 1850, (see Appendix). After the transfer the institution was conducted exactly as before, in religion, instruction and the inculcation of sound literature and solid science (Tr. p. 3). The principals of the school were still members of the Mission and reported regularly to it as to their work in inculcating the doctrine held by the Mission and the result of their religious instruction, the school being maintained for the purposes for which it was originally instituted, namely, primarily, to raise up a class of educated Hawaiians who might become either ministers of the Gospel and thus diffuse religious instruction, or might fit themselves for high civil stations and be equipped for that by a thorough instruction in religious doctrines and by a public profession of religion which would be a safeguard and a guaranty for the future of religious work within the islands.

The reports to the Mission year by year show that this work was done, and that six who were connected with the school since it was taken over by the Hawaiian Government had become ordained ministers. (Tr. pp. 3-4.)

About 1865, and after the establishment of the Anglican Mission, the question of the power of the Government to maintain and control the school, and particularly whether the Mission had the right to nominate its instructors was raised. By that time in the common schools religious instruction had been eliminated,

but it was recognized that it was necessary to still teach the doctrines enumerated in the Confession of Faith and conduct Lahainaluna as a sectarian school. The letter of Attorney General Harris to the Board of Education, October 29th, 1864, (Tr. p. 4,) advises them that only those sects can control the school which teach the doctrines of each and all the articles of the second Confession of Faith, and if the Government was not willing to keep the conditions, the property and improvements must be restored to the A. B. C. F. M. In the following year the Board of Education declare (Tr. p. 5), "that a full compliance with the agreement consists in the appointment of persons teaching in the doctrine and after the manner of the Congregational and Presbyterian Churches of the United States," and if the Board did not see fit to carry on the institution, they must re-convey it or pay the sum of $15,000. The declaration quoted is contained in a letter to S. N. Castle, the attorney of the A. B. C. F. M., and arose out of a discussion of the right to control religious instruction by the Mission. Religious instruction, upon the lines pursued by the Mission and subsequently by the Government according to the agreement, continued until about the first day of July, 1903, when it ceased to be a part of the curriculum, and since then has been no longer given. The "cultivation of sound literature and solid science" has ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

Grounds on Which Petition Rests.

The grounds on which the petition rests are two:

First: That the Hawaiian Government took the property agreeing to continue the school upon the principles on which it was established and teach the faith upheld by the Mission; Second: That it agreed to continue it as an institution of learning, and that it has converted it into a technical school.

Upon both grounds the petitioners claim that they are entitled to the sum of $15,000, as upon either ground it is apparent that the Government has elected to retain the land for the purposes of the agricultural school.

Grounds of Territory's Demurrer.

The grounds of the demurrer (Tr. p. 18) are stated by the Court, in its opinion, as follows:

(1) That this Court has no jurisdiction of the claim for damages.

(2) That the United States, to whom the land has been ceded upon which the school is established, ought to be made co-defendant.

(3) That no cause of action is stated, it appearing:

(a) That the agreement was subject to ratification by the legislature and the act of July 11, 1850, relating to the Lahainaluna Seminary failed to set forth the terms on which the arrangement was made but merely that one had been made "whereby the seminary of Lahainaluna has been ceded to the King's government on condition that the government undertakes its support;"

(b) That the right of action, if any, accrued upon annexation in 1898, more than two years prior to the commencement of this action;

(c) That no breach of any condition is shown, and

(d) That if the conditions of the agreement were broken this was done in consequence of laws rendering the performance of them impossible.

(4) That the petition pleads conclusions of law in its assignment of breach of conditions, not setting forth in what respect the conditions were broken.

Decision of the Supreme Court of Hawaii.

The Court overruled the first, second and fourth grounds, subdivision (a) and (b) of the third ground, sustained sub-division (c) of the third ground, and expressed no opinion upon subdivision (d), holding that the question of the effect of subsequent legislation did not arise in view of its decision.

In sustaining the contention that no breach of any condition had been shown, the Court, after stating the claim of the petitioners and discussing some of the cases cited by them and deducing from them the rule that the contract must be of doubtful import in order to admit oral evidence, the Court continues:

"The terms of agreement are not of doubtful import,—they are as clear as language can express. Why it was that no condition was made which required the government to give religious instruction, why the representatives of the board thought that this condition would be observed although not expressed, and why it appears to have been regarded by the government as an implied condition, becomes evident, we think, upon reflection. No man of New England birth and training was unfamiliar with the general custom prevailing in the public schools of giving at least the amount of religious instruction included in morning prayers and scriptural readings; no one familiar with this custom, as were most, if not all, of the missionaries in Hawaii, would for a moment have doubted that some sort of religious instruction would continue indefinitely to be taught at the Lahainaluna school as well as all other schools. In the thought of the American board, and of the Hawaiian Mission as well, it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed. Those officers of the Hawaiian government, who, like Attorney General Harris, were members of the protestant Episcopal Church, were perfectly aware of the distinctive theological tenets of their own church and of other evangelical churches of America and knew that the teaching at Lahainaluna of their own church doctrines would be to repudiate the agreement with the American Board and would result in a forfeiture of the property transferred to the government by the board unless the sum of $15,000 should be paid in accordance with the agreement; they did not, on their part, contemplate that which has come to pass, namely, that the school might receive no religious instruction upon any theological basis. One may regret that wise and devout Christian men in America, whose practical Christianity was sufficient to enable them in their several ways to accomplish so much for the uplifting of humanity, have found themselves unable to agree upon some form of religious instruction in the schools, but thus far this has not come about.

Whatever the reasons which influenced the Hawaiian government in treating the agreement as it did, its officers had no power to add to or subtract from its clearly expressed terms, nor did they by carefully avoiding the teaching of any doctrines, other than those mentioned in the agreement, thereby admit any obligation of the government to teach any doctrines.

As for the American Board, whether by oversight, or because they thought it unnecessary, or that it was unwise in view of the possibility of exciting antagonism in the legislature or in the

cabinet of the King, they did not incorporate in the agreement the requirement which the plaintiffs say was intended to be agreed upon. The Court has no right to take the agreement as meaning anything else than it clearly expresses."

Upon the second ground the Court says that an agricultural school does not eliminate but includes instruction in sound literature and solid science, holding that the science of agriculture cannot be taught without teaching at the same time literature relating to the science, and that as little literature was taught in American schools fifty years ago a technical school of this day would be as likely to impart in connection with technical studies correct and intelligent use of language as when made a separate subject of study.

ERRORS ASSIGNED.

Ten errors are assigned (72 pp., 27, 28), but they are all summed up in the error of sustaining the Demurrer as against both grounds set forth in the Petition in the light of the surrounding circumstances, and the subsequent construction by the parties.

ARGUMENT.

I.

THE CENTRAL PURPOSE OF THE AGREEMENT WAS TO "CONTINUE" AN ESTABLISHED INSTITUTION, THE KEY-STONE OF A SYSTEM WITH DEFINED AND WELL-KNOWN AIMS, THE CHIEF BEING THE PROMOTION OF RELIGION BY INSTRUCTION IN DEFINITE RELIGIOUS TRUTH.

The Agreement not integrated.

We observe that the agreement which the court is to construe was not one which the parties looked upon as setting forth in *haec verba* the final form of the agreement. The resolutions of the Mission, directed to be transmitted to the government, (Ex. E, Tr. pp. 13-14), show this.

It must be remembered that the Minister of Public Instruction was himself a missionary (the father of Gen. S. C. Armstrong), who had been recently called from the Kawaiahao church to this office, and it is probable that he was present at the meeting of the Mission when this vote was passed, as well as the vote of the Mission at the same meeting; "to make over this seminary to the Government; it being understood that it is to be conducted on the same principles as heretofore," and it would appear that he also contemplated the necessity of a further deed. (Ex. G, Tr. p. 16.) "It will be desirable I think when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board and the Legislature of the Islands." But, as appears from Exhibit "H" (Tr. p. 16) when ratified by the A. B. C. F. M. no instrument of conveyance was executed and the matter dropped.

In construing the correspondence, the court should bear in mind that both parties contemplated that the language used was not a definite and final expression such as is contained in that class of documents from which the rule of interpretation of written documents arose, namely, engrossed writings, and all the more should look for the spirit of the agreement, the situation of the parties, their motives, their conduct, their after-construction of the agreement, and putting itself in their place construe it as the parties construed it.

Parol Evidence only Necessary to Show what is the Existing Institution.

We admit that parol evidence is necessary in order to apply the contract, for it was undoubtedly a part of the contract that an existing institution should be continued, and it is a matter of fact to be determined by parol evidence what that existing institution was.

This Evidence Shows that the Promotion of Religion by the Inculcation of a Definite System of Doctrine was the Central Purpose of the Mission and of the Seminary.

In resorting to parol evidence to determine the character of the institution to be continued, it is necessary to examine into its source, the purpose of its establishment, its aims, its methods, which inquiries reveal that the Mission from which it sprung believed in a system of theology, and believed absolutely and conscientiously that that system could be applied to the government of a state and was the only perfect rule of guidance, particularly for a savage nation in its rudimentary development to civilization and christianity. Therefore, they purposed to found in Hawaii a theocracy in which the Scriptures as interpreted by their creed should be the fundamental law, to inculcate which they established a system of schools in which the study of the Scripture and of religious truth was the primary purposes, of which system the Lahainaluna Seminary, from which preachers and teachers of that truth should go forth, was the key-stone.

This is consistent with the conduct of the parties at the time, their declarations in the correspondence and the construction which has been put upon the agreement in after years. Can it be, when the Mission has been lulled into security by the assurance of the Hawaiian government as late as 1865 that there was no misunderstanding as to the construction of the contract, that after forty years longer adherence it can now be repudiated?

Many other facts point irresistably to this conclusion, some of which we discuss more fully under another head and some now allude to.

This Purpose of the Mission well known.

In 1826 came the first clash and all the missionaries signed what has been termed their "Challenge" to the world, October 3rd, 1826, (Missionary Herald, Vol. 23, 1827, pp. 240-245). In this it is said:

"The general object of the American Board of Commissioners for Foreign Missions, was early stated to the public to be 'To propagate the Gospel in heathen lands, by supporting missionaries, and diffusing a knowledge of the Holy Scriptures.' In the year 1812, the legislature of Massachusetts gave their legal sanction to this object, and made a forfeiture of the funds of the Board, the penalty for unfaithfulness in the prosecution of it."

The instructions given to the missionaries on embarking are recited "to aim at nothing short of covering these islands with fruitful fields and pleasant dwellings, and schools and churches and raising up the whole people to an elevated state of Christian civilization."

They further declare that they have uniformly and perseveringly withheld advice from the chiefs or people "where we could not refer the decision of the question either to the Scriptures or to the uniform practice of Christian nations, but where the Scriptures are plain or the practices of Christians uniform, we have felt, and still feel, at liberty to speak with freedom." That they have inculcated in the chiefs not only the duties of morality, but that "he that ruleth must be just, ruling in the fear of the Lord;" that they have given them general principles derived from the Word of God, with Scriptural examples of their application, and conclude:

"If the doctrines and duties of Christianity, in which the Church of England, the Church of Scotland, the Presbyterian and other churches in America are agreed, are not adapted to correct the evils which exist in heathen nations; if these doctrines and duties, when faithfully taught, by precept and example, have no good influence to cure the evils of the human heart, and to promote virtue, order and happiness in society, then the missionary, and the philanthropist, too, may sit down together in despair and pronounce the evils among the heathens incurable; for if these fail we may challenge the wisdom of the world to devise a system of morals, and to propose any practical measures which will raise a savage tribe or a heathen nation from their native depravity to a state of civilization and virtuous life."

The result of this challenge was a trial before Capt. Thomas Ap Catesby Jones of the United States Sloop Peacock, which resulted in what he called in his published statement, "the most perfect, full, complete and triumphant victory for the missionaries that could have been asked by their most devoted friends." (Bingham p. 303.)

To Spread the Knowledge of the Scriptures and of these Doctrines Christian Schools Established.

To accomplish these purposes, they established a system of schools in which they had an aggregate of one-third of the entire population as scholars, in which the Bible was the chief text book and the teaching of moral and of evangelical truths the highest aim. The report of the Mission in 1835 (see appendix) shows that they taught by plain precepts the science of duty, used evangelical tracts and portions of Scripture as reading lessons for all the schools and endeavored to give them an influence similar to that of Sabbath schools.

To Train its Ministry, the Mission Established Lahainaluna Seminary in 1831.

Having in mind the purpose of training a Christian ministry, they established the Lahainaluna Seminary.

The Duty Understood by the Hawaiian Nation.

Nor was there any misunderstanding on the part of the Hawaiian nation. When the French priests came to the islands during the regency of Kaahumanu, in the very year of the establishment of this Seminary, when the elder Bingham remonstrated against the punishment of the papists, he asked Kaahumanu by what authority they were punished, she said: "By the law against idolatry, for they have violated that law in renewing the worship of images." (Bingham, p. 421.) She referred to the decree of Kamehameha II in 1819 abolishing idolatry before the arrival of the missionaries, as well as to the Ten Commandments, which had been adopted, if not formally, at least in spirit, as the law of the Kingdom six years before.

We refer the Court to Bingham's description of the relation of Church and State in the Hawaiian Islands, in these early days of Christianity, all of which he saw and a great part of which he was. He says the missionaries carefully guarded against a union of the church and state, yet the state is a religious institution deriving all its powers from God, its Chief Magistrate being emphatically God's minister, and being bound as well as their subjects to do God's will; that "it was a matter of admiration" to see Queen Kaahumanu and her counsellors aim-

ing to secure the inculcation of the principles of God's inspired Statute Book, making Christianity a part of the common law of the land, building sanctuaries and school houses in a state founded for the execution of God's will, in which he has put his statute book into the hands of his magistrates for their guidance. That Queen Kaahumanu and her counsellors regarded God's Statutes as binding on all without civil enactment, and "without specifically adopting the Ten Commandments as a criminal code or Christ's Sermon on the Mount as a civil code, they still sought to follow them as divinely inspired teachings." (Bingham pp. 278-282.)

This System of Religion Recognized in the Constitution of 1840.

It was further recognized both in the Declaration of Rights of 1839 drawn up at Lahainaluna by a graduate (Blackman, Making of Hawaii, p. 1061), and in the first Constitution of Hawaii granted by Kamehameha III October 8th, 1840, portions of which we give in the appendix, in which it is declared that God is the creator of all nations, the bestower of rights, that the office of ruler comes from God, that the Kingdom should be governed by his laws, wherefore it is provided "that no law shall be enacted which is at variance with the word of the Lord Jehovah or at variance with the *general spirit of his word.*" By "the general spirit of his word" is meant as interpreted by the Mission. It was under this constitution that the contract in question was made.

By the Laws.

Furthermore, by the laws of 1842 quoted in the appendix, the Mission Seminary was recognized as a part of the school system and its scholars freed from money taxes. By the same laws a rigid enforcement of the Sabbath was provided, on the ground that the nation cannot "enjoy peace nor the people prosper unless they are taught in morals and religion."

In the Ordinance Against the French Priests.

It was recognized again in the ordinance rejecting the Catholic religion on December 18th, 1837, in which Kamehameha III forbade its teaching, on the ground "that it is not proper that two religions should be found in this small Kingdom." (Jarves' History of the Sandwich Islands, Boston, 1843, pp. 390-392.)

By Kamehameha III to the American Consul.

Again, by Kamehameha III in his reply to the United States Consul as to the influence of the Protestant missionaries in the expulsion of the priests, in which, after reciting the arrival of the Protestant missionaries, their communicating instruction in letters, delivering the word of God, and the chiefs and people turning to them to be instructed in letters, "for those things were in our opinion really true," he again refers to Mr. Bingham's remontrating with Kaahumanu on the ground that there was no law to punish the Papists, and recites Kaahumanu's reply that there was the law respecting idolatry, "the worship of which we have forshaken." (Jarves, pp. 393-395.)

And to the French Commander.

Again, in the correspondence between Kamehameha III and the Captain of the French Sloop Embuscade in 1842, the first demand of the French commander was "that a Catholic High School, with the same privileges as the High School at Lahainaluna, be immediately acknowledged, and that a lot of land be granted to it by the Government, according to promise." To this demand the King acceded on the ground that the laws favored literature. (Bingham, pp. 590-591.)

By President Tyler in a Message to Congress.

It was recognized by President Tyler in his message to Congress, December 31, 1842, in which he says of Hawaii, while dealing with the subject of the French intervention:

"Just emerging from a state of barbarism, the government of the islands is as yet feeble; but its dispositions appear to be just and pacific, and it seems anxious to improve the condition of its people by the introduction of knowledge, of religious and moral institutions, means of education, and the arts of civilized life." (Jarves, p. 375.)

In the Existing Literature of the Islands.

It is a recognized fact in the literature of the Islands prior to the transfer of the Seminary. We have quoted from Bingham and Jarves, standard literature of the Islands at the time of this contract; but the work with which the Islands were most familiar was Dibble's History of the Sandwich Islands, printed at Lahainaluna in 1843, which had been in large part published earlier both in the Hawaiian and in the English language. The Rev. Mr. Dibble taught at Lahainaluna for many years. His work breathes the purpose of the schools, and particularly of Lahainaluna, and he discusses the purpose of education at great length and urges as reasons for it (Dibble, pp. 289-304):

1. That without schools there cannot be intelligent hearers of the Gospel.

2. They afford the most favorable opening for communicating Gospel truths.

3. They raise up native preachers.

4. And other laborers in the Gospel work.

5. They enable laborers to become skilled, instead of being unskilled, so as to diversify employment. But he says of this system of education:

"When I speak of a system of education, I mean, of course, a system baptized with the Holy Ghost—most thoroughly under the influence of the religion of Christ, entered upon and prosecuted at every step with fervent and humble prayer." (Dibble, pp. 301-302.)

6. Without schools the people will relapse and grow hardened against the influences of Christianity, with schools they can be trained in religious feelings and moral habits and safely gathered into the fold of Christ.

7. Schools are necessary to guard against the insidious efforts of Romanists.

8. The training of native helpers is called for on account of local circumstances.

9. It will be a source of help in evangelizing the whole Pacific.

After this general statement of the purpose for which the Mission has entered into the cause of education, he says the Mission Seminary first claims attention, and after defining it as defined in its laws as before quoted, he gives an account of the history and purposes of that school too long to quote (pp. 305-318), and in describing it says of its pupils:

"They answer with readiness questions in history, philosophy and religion and demonstrate with precision problems and theorems of the exact sciences. They are in process of training to be teachers and preachers to their own countrymen, and to other barbarous nations. Already scholars from the school have been of immense service to teachers, catechists, exhorters and as advisors to the chiefs." (Dibble, pp. 336-7.)

It is therefore a fact recognized by the Constitution, by the laws, by public decree, by historical proof and by general knowledge that the Mission Seminary had for its chief aim the promotion of religion by the inculcation of definite religious truth as held by the Mission Fathers, and this fact known to the parties to the agreement shows in connection with the correspondence that the central purpose was to continue the institution with these definite and known aims and this well settled course of instruction.

Turning to the adjudicated cases for rules of construction,

A term can be read into a contract from the surrounding circumstances.

Said the Supreme Court of the United States in a case which has been a leading case on this subject:

"It is a principle recognized and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated."

Bradley v. Washington, Alexandria & Georgetown Packet Co., 13 Pet. 89: 10 L. ed. 72.

In this case where the contract, growing as this one did out of correspondence, showed an agreement to pay for a steamboat at a certain rate per day, there was read in the understanding of the parties that the time when navigation was closed was to be deducted, and to show this the Court admitted evidence that all the parties knew that during such time the transportation was overland.

"Extrinsic evidence is admissible, of all the circumstances surrounding the author of an instrument, to explain the sense in which he understood it."

Reed v. Merchants' Mut. Ins. Co., 95 U. S. 23: 24 L. ed. 348.

The authorities are cited in a note to *Field v. Munson*, 47 N. Y. 221, in the edition annotated by Brown and Cook; also 6 English Ruling Cases 169, and the following cases, which sustain the decision in the case in Peters, that even if there is no provision in the contract, evidence of the circumstances may be offered to show that such was a part of the contract.

Shouse v. Doan, 39 Fla. 95, 21 So. 807.

Merchants' & Mechanics' Savings Bank v. Fraze, 9 Ind. App. 161, 36 N. E. 378.

Staples v. Edwards & McCullock Lumber Co., 56 Minn. 16, 57 N. W. 220.

O'Dea v. City of Winona, 41 Minn. 424, 43 N. W. 97.

Jennings v. Whitehead Co, 138 Mass. 594.

Erskine v. Adeane, L. R. 8 Ch. 756.

Katz and Bedford, 77 Cal. 319.

People's National Gas Co. v. Braddock Wire Co., 155 Pa. St. 22, 25 Atl. 749.

Cleburne Water Co. v. Cleburne, 138 Tex. Civ. App. 141, 35 S. W. 733.

Nilson v. Morse, 52 Wis. 240, 9 N. W. 1.

A term can be read in from the construction by the parties.

It is not necessary to go to the surrounding circumstances in order to explain this contract since the parties have put their own construction on it. "Tell me," says Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what that deed means." The Circuit Court of Appeals of the 8th Circuit says "this remark of the Lord Chancellor has come to be accepted as a maxim in the construction of contracts," citing a large number of cases.

Chicago G. W. Ry. Co. v. N. Pac. Ry. Co., 101 Fed. 792.

In that case a provision was read into a contract which the court found was intended from the after-construction by the parties, referring to an earlier case in the Federal Reports, one of the numerous cases arising in the Wabash foreclosure, in which the court says:

"'A construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract,' says Dr. Wharton in his work on Contracts, Vol. 1, Sec. 206, if such construction does not conflict with its express provisions. The manner in which a construction of a contract adopted and acted upon by both parties may, so to speak, be worked into a contract, is well illustrated in *Topliff v. Topliff*, above cited, and also in the case of *Robinson v. U. S.*, 13 Wall. 363."

Central Trust Co. of N. Y. v. Wabash St. Louis & P. Ry. Co., 34 Fed. 254, 256.

These cases are supported by abundant authority.

Thus contemporaneous construction may be considered,

Union Pac. Ry. Co. v. Anderson, 11 Colo. 239, 18 Pac. 24;

Cornwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611;

Merchants' & Mechanics' Savings Bank v. Fraze, ubi supra;

and subsequent construction,

Webster v. Clarke, 34 Fla. 637, 16 So. 601;

Consolidated Coal Company v. Schneider, 163 Ill. 393, 45 N. E. 126.

Hill v. City of Duluth, 57 Minn. 231, 58 N. W. 992.

First National Bank v. Jagger, 41 Minn. 308, 43 N. W. 70.

Paxton v. Smith, 41 Neb. 56, 59 N. W. 690.

Cincinnati v. Cincinnati, Etc., Co., 53 Ohio St. 278 41 N. E. 239.

Fuller v. Baxter, 59 Vt. 467, 8 Atl. 493.

Hosmer v. McDonald, 80 Wis. 54, 49 N. W. 112.

It has even been held that the testimonies of the parties may be received directly as to their understanding when there is any ambiguity.

Ganser v. Fireman's Fund Ins. Co., 36 Minn. 74, 35 N. W. 584.

Cleburne Water Co. v. Cleburne, ubi supra.

And that the practical construction by the parties should prevail over any mere technical interpretation.

Davis v. Ravenna Creamery Co., 48 Neb. 471, 67 N. W. 436.

The decisions in the Supreme Court of the United States fully sustain the principles on which we contend:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269; 24 L. C. P. 410.

"The practical construction which the parties put upon the terms of their own contract, and according to which the work

thereunder was done, should prevail over the literal meaning of the contract, where one party thereto seeks to obtain a deduction in the contract price in accordance with such literal meaning."

District of Columbia v. Gallagher, 124 U. S. 505: 31 L. ed. 526.

"In cases where the language used by the parties to the contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence."

Topliff v. Topliff, 122 U. S. 121: 30 L. 1110.

"Acquiescence for ten years, by the parties, in a certain construction of a contract is evidence of the intention of the parties in making it." The publishers took the whole copyright. At the time contract was made the copyright lasted 28 years, it was afterwards, by act of Congress, extended 14 years, author claimed the copyright after termination of 28 years. Held, he had sold his entire interest.

Paige v. Banks, 13 Wall. (U. S.) 608: 20 L. 709.

To the same effect,

Philadelphia R. R. Co. v. Trimble, 10 Wall. (U. S.) 367: 19 L. 948.

"Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence."

Chicago v. Sheldon, 9 Wall. (U. S.) 50: 19 L. 594.

"The practical interpretation which the parties by their conduct have given to a written instrument, is always admitted, and is entitled to weight as to the intention of the instrument."

Cavazoo v. Trevino, 6 Wall. (U. S.) 773, 18 L. ed. 813.

This role has been uniformly followed by the Federal Courts.

Rockefeller v. Merritt, 76 Fed. 909.
Leavitt v. Windsor Land & Investment Co., 54 Fed. 439.
Foster v. Goldschmidt, 21 Fed. 70.
Nickerson v. Atchinson T. & S. F. R. Co., 17 Fed. 409.

As has been said by the Supreme Court of Vermont *(White v. Amsden,* 67 Vt. 1, 30 Atl. 972):

"The great object indeed the only foundation of all rules of construction of contracts is to come at the intention of the parties. If the words of a contract are equivocal, resort may always be had to the circumstances under which the contract was executed and to the contemporaneous construction given the contract by the parties, as evidenced by possession or similar acts. The subsequent acts of the parties have always been admitted to show how the parties understood their contract and as a practical construction of it."

In this case the record leaves no doubt of the construction the parties put upon the contract.

II.

THE INSTRUMENTS CONSTRUED AS A WHOLE MAKE IT A NECESSARY INFERENCE THAT THE MAINTENANCE OF RELIGIOUS INSTRUCTION AND TRAINING IN THE DOCTRINES OF THE MISSION WERE A PART OF THE CONTRACT, AND THIS TERM WILL BE READ IN.

It is not necessary to go to the construction of the contract by the parties or to the surrounding circumstances, more than to determine the character of the institution, or to the rule laid down by Wharton, cited in the Wabash case, that the construction of a contract adopted and acted upon by both parties would be regarded as worked into the contract, for all these instruments are to be construed as a whole and a term which can be inferred from a consideration of the entire negotiation is as much a part of the contract as if expressly set forth, and this contract as clearly shows as if it were expressly set forth that the maintenance of religious instruction and the training in the doctrines held by the Mission was as much a part of the condition as that other doctrines should not be taught.

"Since a contract is to be construed as a whole, terms which can be inferred from a consideration of the entire instrument are as much a part of the contract as if expressly set forth therein,"

2 Page on Contracts, 1740 Sec. 1118.

Courts have even gone so far as to hold that where the contract speaks of one, the plural can be inferred.

Halt v. First National Bank, 133 Ill. 234.

And a conveyance for use as a burial place for a member of the Roman Catholic church in consecrated ground would restrict the lot holder from interring therein any person not recognized by the church authorities as a Catholic, although no such clause was in the agreement.

In this case, the court said, as to the incorporation in the contract of the laws, usages and discipline of the Roman Catholic Church:

"In the absence of any special contract, excluding this *status* by the omission of a restriction in a formal deed or agreement, the presumption is a just and reasonable one that such *status* was a part of the transaction, and that the laws and usages to which we have referred were understood by both parties as lying at the very root of the negotiation, and pervading it throughout."

Dwenger v. Geary, 113 Ind. 106: 14 N. E. 903.

The vote of the Mission was (Tr. p. 2), "to make over the seminary, it being understood it was to be conducted on the same principles as heretofore," which principles are to aid the Mission in accomplishing the great work for which they were sent, to introduce and perpetuate the religion of Jesus Christ, and to educate young men of piety as teachers of religion (Tr. p. 8). The letter of the committee, after reciting the establishment of the institution in order to promote the diffusion of enlightened literature and Christianity throughout the islands, how it had been cherished by the Mission, that no means had been spared to secure the object of its establishment, that it had been planted and sustained by the American Board out of donations given for the spread of the gospel, that the Board is indebted, and as a consequence must diminish its expenditures, and will be unable to carry on the work, and believing that the transfer of the institution to the fostering care and patronage of the government will promote the highest interests of the Hawaiian peo-

ple, submits the proposition to relinquish the property known as the "Mission Seminary" to the Government, provided that the Government agrees that *"the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach, or allow to be taught any religious tenet contrary to those heretofore taught by the mission,"* and again, the institution is to be temporarily transferred, pending the confirmation by the Board, to be retransferred in case of failure of such confirmation, showing that they expected to receive back the same institution which they turned over.

The Government's view is further shown by the resolutions (Tr. p. 12), "to allow the institution with all additions and improvements to revert to the said Mission to be held on behalf of the American Board of Commissioners for Foreign Missions, or to pay the sum of $15,000; provided also that in case this Government shall find it expedient to divert this establishment to other purposes than those of education, it shall be at liberty to do so on condition that it sustain an *institution of like character and on similar principles* in some other place on the islands or pay the sum of $15,000 to said Mission."

Here is an express declaration that a fundamental purpose of the transfer was to sustain an institution either at Lahainaluna or some other place in the islands *"of like character and on similar principles,"* and the Government had the option to remove the institution, but if it failed to maintain an institution of like character and on similar principles, it can retain the property by payment of $15,000 to the Mission.

Again the agreement is to continue the "Mission Seminary," and while the word has in popular significance a wider meaning the context here shows that it was intended to be a Seminary for the training of Ministers.

Again, in the letter of the committee submitting a substituted confession of faith, there is to our mind a conclusive evidence that religious instruction in accordance with the confession of faith was the central feature of the institution transferred, and that this was to be maintained. Not satisfied with the first confession which they say would admit of teachings subversive to

Evangelical Christianity, they submit an iron-bound confession of faith which we have already characterized. Can anyone reading this confession for a moment believe that it was in accordance with the agreement of transfer that no religious instruction was to be given when the very object of the Mission was to recall lost men and bring to their knowledge the truths of Evangelical Christianity? Can it be conceived that the Mission Fathers for a moment were making no conditions for the teaching of doctrine where they provide that nothing inconsistent with *these doctrines* shall be taught,—or what is still more to the point, can it be for a moment contended (to use the words of the letter) that it would not be "subversive to Evangelical Christianity" to maintain the institution without religious instruction? We think no one who reads the confession of faith set forth in the second letter can draw from this confession of faith which was to be incorporated into the deed of conveyance any other inference than that it was in the minds of these men trained in the Shorter Catechism that religious instruction should be maintained and that the failure to give any religious instruction at all would be as much a teaching of religious tenets or doctrines contrary to those heretofore inculcated by the Mission, the chief of which was the necessity of religious instruction, as if it were expressed in so many words.

Etymological Definition of the Terms Show the Purpose to Continue the Instruction to Promote Definite Religious Truths.

The etymological definitions of the terms clarify the meaning. The Government was to continue the Seminary. The Century Dictionary defines "continue" as "to cause to remain as before," and "Seminary" as "Specifically a school for the education of men for the priesthood or ministry." Primarily, a Seminary is a seed plot, the seed which these missionaries sought to sow in Hawaii was the Word of God as interpreted by the Confession of Faith which they made a part of this transaction.

III.

THE BIBLE WAS THE SOUNDEST LITERATURE AND RELIGION AS HELD BY THE MISSION, THE MOST SOLID SCIENCE IN THE MINDS OF THE PARTIES TO THIS CONTRACT AT THAT DATE, 1849, AND AT THAT PLACE, THE HAWAIIAN ISLANDS.

The men who were making this contract were living in a land rescued in that generation from heathenism, converted into a Christian nation under the influence of the American Mission. To the missionaries and to the people of that land sound literature and solid science had a more limited meaning than it has to the minds of the American people of this generation. The learned judge who wrote the opinion in the Court of Hawaii recognizes this when he says that "then no one would have doubted that religious instruction would continue indefinitely in this school as well as in all other schools; that it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed." It was then within the contemplation of the parties, by the admission of the court that religious instruction would be given and that this instruction would be confined to the doctrines held by the Mission. Our present contention is that this understanding is incorporated in the language of the instrument.

It has been the universal admission of critics of all times that the Bible contains the best of literature and when in a communication of the Mission the words sound literature as a requirement was inserted, the Mission meant to include the best and soundest of literature. The word "sound" is used in the sense of substantial, true, reliable, as distinguished from that which is unsound or fallacious.

The word "solid" is used in the same sense and when the Mission used the term "solid science" they meant the oldest and most solid of sciences, religion. They understood the distinction between religion and the exact sciences, which is drawn in one of the extracts from Dibble already referred to.

Socrates, who is the founder of the scientific method and the first of moral philosophers, held that there was no science of physics, but only of metaphysics.

That Kamehameha III, the other party to the contract, considered religion a science is shown by the Constitution of 1840, which he promulgated, which recognized that government had its source and finds its limitations in religion, and in the expulsion of the Papists he had already declared that the state had a definite system of religion (taught by the missionaries) and that to introduce another would cause confusion.

All parties recognized it, for the substituted Confession of Faith (Tr. p. 15) declares that the Scriptures contain "a complete and harmonious system of divine truth, and are the only true rule of Christian faith and practice, and that God is not only the maker of all things, but that he governs all things according to his will, and that the principles and administration of this government are wholly just and good," an explicit declaration that the proper government of a state is a theocracy, that there is a science of systematic theology, and that the laws of this science are found in the Scriptures as interpreted by this creed.

Finally there could be no misunderstanding by either party. The design of the Seminary is set forth in its laws. In the petition is given (1.) and (4.) of Chapter I on its Design (Tr. p. 8), (1.) which sets out the primary object to aid the Mission in introducing and perpetuating the religion of Christ with all its accompanying blessings, civil, literary and religious; the Chapter then continues:

"2. As a means of accomplishing this great end, it is the design of the Seminary to disseminate sound knowledge throughout the Islands, embracing general literature and sciences, and whatever may tend to elevate the whole mass of the people, from their present ignorance and degradation, and cause them to become a thinking, enlightened and virtuous people."

We note that sound knowledge is said to embrace general literature and the sciences. Hence the expression "sound knowledge" is equivalent to that used in the resolutions of "sound literature and solid science."

What the people of the islands and what the missionaries understood by disseminating "sound knowledge" throughout the islands is shown by what they had done, which was to print and circulate the Bible, to teach it as a text book, and to teach the science of religion held by the Mission. When, therefore, they said that the Seminary was to be continued as an "institution for the cultivation of sound literature and solid science," they were using the same term which expressed the existing purpose of the institution, and of that existing purpose there could be no misunderstanding, because for eighteen years it had been in full operation carrying out that purpose. Therefore, when the parties declared that the Seminary should be continued as an institution for the cultivation of sound literature and solid science they understood that it was to be continued for the same purpose for which it was originally established.

Where two phrases are used as meaning the same thing, and one interpretes the meaning, such interpretation is to be followed in the interpretation of the contract.

Simpson v. United States, 199 U. S. 394.

An academy established for "the purpose of promoting religion and morality, and for the education of youth in such of the liberal arts and sciences as the trustees shall direct," is a literary and scientific institution.

Wesleyan Academy v. Wilbraham, 100 Mass. 599.

IV.

IF SECULAR LEARNING IS EXCLUSIVELY INTENDED A TECHNICAL SCHOOL IS NOT AN INSTITUTION FOR THE INCULCATION OF GENERAL LEARNING, BUT FOR SPECIAL AND TECHNICAL EDUCATION.

The second ground of recovery alleged in the amended petition is the violation of the condition of transfer and agreement of the Government that the Government should continue the school at its expense as an institution for the cultivation of sound literature and solid science.

This breach is stated as follows: That "on or about July 1, 1904, the said Government ceased to continue the said school as an institution for the cultivation of sound literature and solid science, contrary to its agreement." (Tr. p. 7.) It is further alleged that "the institution has become a technical school under the name of "The Lahainaluna Agricultural School." (Tr. p. 5.)

The petition alleges that, before the transfer to the Government, "the course of instruction comprised * * * the usual topics belonging to secular learning." (Tr. p. 1.) Under the alleged condition and agreement, the Government became obliged to *continue* the school as an institution for the cultivation of sound literature and solid science. In other words, the continuance of the school as an institution for the inculcation of standard secular learning, was required, for a "school for the inculcation of sound literature and solid science" is a "school for the inculcation of standard learning." The terms are synonomous and interchangeable. That they were so in the minds of the parties is clear from the use of the word "continue." But without this clear indication of the intention of the parties, it is submitted that such is the common understanding of the terms.

Literature is "the class of writings in which expression and form, in connection with ideas of permanent and universal interest, are characteristic or essential features, as poetry, romance, history, biography and essays, in contradistinction to scientific works, or those written expressly to impart knowledge." (Century Dictionary.) Science, on the other hand, is "knowledge gained by systematic observation, experiment, and reasoning; knowledge coördinated, arranged, and systematized; also, the prosecution of the truth as thus known, both in the abstract and as a historical development." (Century Dictionary.)

The terms "literature and science" thus, in common parlance, cover the general field of knowledge and learning, each defining a part of the field. It follows that a school for the inculcation of literature and science, is a school for the inculcation of general learning and knowledge. In order to come within the term, its purpose must be to impart general education.

A technical school, on the other hand, is not a school the purpose of which is to impart general education or general learning. Its purpose is to teach the adaptation and application of particular kinds of knowledge to the industries of life. In the words of Huxley, "technical education * * * means that sort of education which is specially adapted to the needs of men whose business in life is to pursue some kind of handicraft." The definition is particularly applicable to the education afforded by an agricultural school.

When, therefore, the transfer of the school at Lahainaluna was made, the condition of the transfer was that its character as a general educational institution should be maintained. But its transformation into an agricultural school has changed its character from that of a school for the inculcation of general education to that of a school for the inculcation of special and technical education. It does not, therefore, meet the requirement that the school be maintained as a school for the cultivation of "sound literature and solid science."

The territorial supreme court dealt with the condition of transfer as if it merely required that literature and science should be taught in the school, whether incidentally or as the purpose of the school. The court says, "An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. We are not prepared to say that such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science."

With all respect, we insist that the condition was not merely that science and literature should be taught in the school; it was that the purpose and design of the school should be the cultivation of sound literature and solid science. It was intended thereby to define the character of the school required to be maintained by the Government. The construction of the Territorial court disregards the requirements of a definite character for the school, that of being a literary and scientific institution and is

satisfied with incidental instruction in literature and science. But we submit that incidental instruction of literature and science does not make a technical school, and particularly an agricultural school, a literary and scientific institution.

While a question of language primarily, the question has received judicial construction in a number of cases and the distinction stated has been uniformly recognized.

Thus in *Detroit Home & Day School v. City of Detroit*, 76 Mich. 521: 43 N. W. 593, the Michigan Supreme Court said: "But it is a matter of common knowledge that all general educational establishments have universally been known as 'scientific institutions,' and fall naturally and directly within it. A 'scientific institution,' under the language of all civilized countries, means an institution for the advancement or promotion of knowledge, which is the English rendering of 'science.'" A technical school does not come within this definition. Its purpose is not the promotion of knowledge for itself; its purpose is much more special,—the training of men for particular industries and in the application of selected branches of knowledge.

In *Lichentag v. Tax Collector*, 46 La. Ann. 572: 15 So. 176, the court was called upon to decide whether or not the building of a school of stenography and typewriting was exempt under a provision of the constitution exempting property used for colleges or other school purposes.

The court first held that the word "school" was used in the constitution to describe general educational institutions, the purpose of which is the inculcation of knowledge and mental training. The court then, after comparing stenography and typewriting with music, painting and other special forms of accomplishment, which are generally taught in schools and colleges, said: "Yet no building exclusively devoted to the teaching of these arts would be exempt from taxation for the reason that they do not necessarily enter into any scheme of general knowledge, and are not essential to the training of mental faculties. Stenography is an art; shorthand writing, the use of abbreviations or characters for whole words. Typewriting can scarcely rank as an art, and may be classed as a mechanical occupation, like the setting of type. Neither of these occupations enter into

any scheme of education for the acquisition of knowledge or the training of mental faculties. That they incidentally improve some faculties cannot be disputed; that they may have a healthy influence on all the faculties may be admitted; but many mechanical occupations do the same thing. It is difficult to conceive of any exercise of the physical powers without in some degree exercising a wholesome influence on the mental faculties. The occupation of the plaintiff, which he is teaching to his pupils, presupposes an acquisition of knowledge and a mental training, and the object of the school is not for the purpose intended by the primary or common school or academy. It is the teaching of a trade which the pupils expect to follow for a livelihood. Schools for lawyers and doctors, exclusively devoted to the preparing of them for their professions, presuppose a previously acquired fitness, and they enter into no general plan of common education. The school buildings for these purposes are not exempt, as they are intended for a special class and special purposes or professional calling. And so it is with plaintiff's school. It is intended to educate a particular class for a special object and for a special calling, as an occupation by which to make their way in life. The occupation presupposes all that is required for such a calling as being obtained in some school or college devoted to the purpose of imparting knowledge and mental training."

The court thus having first determined that the word "school" as used in the constitution, meant a school for the cultivation of general knowledge and learning, had no difficulty in placing technical schools without the exemption provided by the constitution.

The case of *Omaha Medical College v. Rush*, 22 Neb. 449: 35 N. W. 222, is not a contravening authority, for there the court construed the word "school" as used in the statute under consideration as not limited to schools for the cultivation of general knowledge and learning. If it be conceded that the word "school" as used was not limited to schools for the cultivation of general knowledge and learning, the court rightly held a technical school within the term as used in the statute.

The precise question was squarely raised in *The People v. Gunn*, 96 N. Y. 317. In that case, the question was whether or not the defendants, constituting a medical school, were legally incorporated by virtue of an enabling act, declaring "all scien-

tific and all literary colleges and universities organized under" certain acts to be legally organized under certain conditions. It was held that they were not legally incorporated. The court said, "We are of opinion that these acts did not authorize the formation of a medical college. According to the ordinary use of language, a medical college would not be described as a scientific institution. It would not be generally classified as such." Again, "As we have already stated, the terms 'literary or scientific college or university' do not embrace a medical college. Section 2 provided that 'all scientific and all literary colleges and universities organized under said acts which shall have reported to the said regents within two years last past, are hereby declared legally incorporated.' The United States Medical College is not a scientific or literary college, and hence again is not embraced within this language."

See also:

Ex parte St. John Law Society, 30 New Bruns. 501: 12 Am. & Eng. Encyc. of Law 332 (2d. ed.), note 6 to p. 331.

Indianapolis v. Sturdevant, 24 Ind. 391.

Commissioners v. Lorrest, L. R. 15 App. Cas. 334.

Mass. Ag. Coll. v. Marden, 156 Mass. 150: 30 N. E. 555.

New Eng. Theos. Corp. v. Boston, 172 Mass 60: 51 N. E. 456.

The Territorial Supreme Court disposes of the foregoing quoted and cited cases in the following words: "Cases are cited which discuss the meaning of literary and scientific institutions, technical schools and schools generally with reference to exemption of property from taxation, but this case does not demand strict construction of a statute which exempts property from taxation."

In none of these cases does it appear, however, that the necessity for strict construction arose. In every case, the question is treated as a matter of common understanding of language.

While an agricultural school is undoubtedly scientific in character, it does not come within the ordinary and common meaning of the expression "literary and scientific institution." Its purpose and design is the training of its students in the application of the restricted branches of knowledge involved in the

special line of industry to be pursued. It is intended to develop experts in the particular handicraft. Incidentally the training involves the acquisition of knowledge, but knowledge of a special character, knowledge which is not intended as the end of the institution, but the means to another and definite end,—the training of men for a specific occupation. Its purpose is not simply to give its students educations; it is to make them experts in a particular occupation.

Since, then, the condition of transfer was intended to define the character of the school to be maintained by the Government, and the character defined is that of a literary and scientific institution, and the school has been transformed into an agricultural school, a technical school, which does not come within that definition, we submit that on this ground also the petition states a good cause of action and that the Territorial Supreme Court erred in holding otherwise.

V.

MINOR GROUNDS OF DEMURRER.

All the other grounds of demurrer were overruled by the Territorial Supreme Court with the exception of the question of impossibility of performance, which, while not specifically, we think, was necessarily also overruled.

We quote the clauses on which defendant relies:

Constitution 1894, Article 97.

"From and after December thirty-first, 1895, no public money shall be appropriated nor public land conveyed to or for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government."

Organic Act, Sec. 55.

"Nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government."

These are the familiar provisions intended to prevent compulsory taxation for the benefit of a religious sect.

State v. Halleck, 16 Nev. 373.

The first amendment to the Constitution of the United States prohibiting Congress from passing any law respecting the establishment of religion is of very limited significance. It has been held not to protect citizens in their religious liberty.

Permoli v. New Orleans, 3 How. 589; 11 L. 739.
Ex Parte Garland, 4 Wall. 333; 18 L. 366.

Under it an appropriation by Congress to a hospital conducted by a monastic order has been sustained.

Bradford v. Roberts, 175 U. S. 291, 44 L. 168.

There are numerous reasons why the provisions do not apply.

(a) The maxim *noscitur a sociis* makes them read "any denominational, sectarian, or *other* private school." A public school is neither sectarian, denominational or private, although it may teach doctrines which are sectarian or denominational. What is forbidden is the appropriation of money to a sectarian school; the familiar definition of a sectarian school as a school controlled by a sect and teaching certain sectarian doctrines.

State v. Trustees, 7 Ohio St. 64.

(b) This conclusion is further strengthened by the clause "or any school not under the exclusive control of the government."

(c) It does not follow that any money has been appropriated for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government; it is only shown that property has been entrusted to the Government as Trustee for this purpose.

(d) It is not intended to control the power of the State in its own institutions, and this has been shown by the action of the legislature.

(e) A better answer is that although it is inconsistent with the spirit of these provisions that sectarian religious instruction should be given by the State,

Reynolds v. United States, 98 U. S. 145, 25 L. 244,
Cooley's Constitutional Limitations, Chap. XIII, cases cited,
Cooley on Taxation, page 197,

in fact the cessation of teaching occurred on the first day of September, 1903, (Tr. p. 5) and so far as these petitioners are concerned it is immaterial whether instruction was continued under the law or in violation of the law. Certainly it could not be objected by the A. B. C. F. M. that there had been a violation of the agreement, when in fact the instruction required by the agreement was still continued.

There is another complete answer to the objection raised by the demurrer. The contract stated in the amended petition is in the alternative. According to the terms of the contract, the Government, upon its failure to continue the required instruction, whether religious or literary and scientific, in the school, became obliged to return the school and the property transferred or at its option to pay to the A. B. C. F. M. or its successors in interest the sum of Fifteen Thousand Dollars. The right of election was therefore in the Government to do the one or the other upon its failure to perform the conditions of the agreement and transfer. This right of election would have to be exercised by the government before suit could be brought by the petitioners and this within a reasonable time after the breach of the condition. After that time the right of election would go to the petitioners. Only upon the election having been completed, could the right of action be said to have accrued. From that time only could the statutory limitation begin to run.

Rewrick v. Goldstone, 48 Cal. 564.
Center v. Center, 38 N. H. 318.
Childs v. Fischer, 62 Ill. 206.
McNitt v. Clark, 7 Johns. (N. Y.) 464.
Mayer v. Dwinell, 29 Vt. 298.
Patchin v. Swift, 21 Vt. 292.

It appears from the petition that the claim of the petitioners was presented to the Government on the first day of September, 1904, and demand made that election should be made by the Government between the alternative liabilities under its agreement. It is alleged further that the Government refused either to reconvey or pay the Fifteen Thousand Dollars. This in itself left it upon the petitioners to elect the liability of the Govern-

ment. If, however, any right of election remained in the latter, it is alleged that it has elected to retain the school and the property. In any case, the liability of the Government became fixed only after its refusal to elect as alleged in the petition. This occurred since September 1, 1904, when the demand was made upon the Government. As the right of action in petitioners accrued only when the liability of the Government became fixed as between the alternative obligation to return the school and property or pay Fifteen Thousand Dollars, it follows that more than two years have not elapsed since the accrual of the action upon which this petition is based.

On the question of impossibility of performance little need be said. The obligation which rests upon the state is purely moral. It cannot be wiped out by one party to the contract making performance impossible by declaring said performance illegal. A moral obligation on the part of the state can no more be escaped by such a process than it can be escaped by an individual. We perceive no reasonable ground upon which this claim is based.

In concluding this argument we remark that we come to the discussion with the single purpose to ask the court to put itself in the situation and into the minds of the parties contracting, remembering that it was the thought of the first half of the nineteenth century, of men whose minds were fired with the missionary spirit, who acted under the compelling conviction that the Bible as read by them was the only rule for human conduct. Nor has this been overlooked by the Supreme Court of Hawaii. So far in the argument they went with us. We ask this court to go one step farther, not only to put itself in the situation and into the minds of the parties and find out what that mind was, but also to construe the language of the instrument in the light thus furnished as it was understood and meant by these parties. If the court will but do this we fear not for our cause, for as has been admitted by the Supreme Court of Hawaii, no reasonable man familiar with this situation and with the minds of the parties, "would have for a moment doubted that some sort of religious instruction would continue indefinitely," in other words, that the indubitable understanding of the parties was

that the work of Lahainaluna would be continued for the great end for which it had been carried on up to this time by teaching religion as held by the Mission to the people of Hawaii.

Wherefore it is submitted that the order of the Supreme Court of Hawaii sustaining the demurrer should be reversed and the demurrer overruled.

Respectfully submitted,

W. R. Castle,

David L. Withington,

W. O. Smith,

A. Lewis, Jr.,

C. H. Olson,

For the Appellants.

APPENDIX.

CHAPTER 129, REVISED LAWS OF HAWAII, 1905.

Sec. 2000. *Jurisdiction, Supreme Court.* The Supreme court shall have exclusive jurisdiction to hear and determine the following matters, and shall determine all questions of fact involved without the intervention of a jury.

First. All claims against the Territory founded upon any statute of the Territory; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the Territory, and all claims which may be referred to it by either house of the legislature; *Provided,* however that no suit shall be maintained, nor shall any process issue against the Territory, based on any contract or any act of any Territorial officer which such officer is not authorized to make or do by the laws of this Territory, nor upon any other cause of action than as herein set forth.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Territory against any person making claim against the Territory under the provisions of this Chapter (L. 1894-5, c. 26, s. 1; C. L. S. 1530).

Sec. 2004. *Limitations on suit.* Every claim against this Territory, cognizable as aforesaid, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the senate or the clerk of the house of representatives, as provided by law, within two years after the claim first accrues; *Provided,* that the claims of persons under legal disability shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within one year after the disability has ceased. (L. 1894-5, c. 26, s. 5; C. L. s. 1534.)

Sec. 2005. *Petition.* The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in the legislature, or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such person became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from this Territory, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to this government, and whether a citizen or not, has not in any way voluntarily aided, abetted, or

given encouragement to rebellion against this government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney. (L. 1894-5, c. 26, s. 6; C. L. s. 1535.)

Sec. 2008. *Judgment is final.* The judgments of the Supreme court in all matters brought before it under the provisions of this chapter shall be final.

EXTRACT FROM BINGHAM'S SANDWICH ISLANDS, 1847, PGS. 423-424.

"To carry forward the work with energy, while the field was fairly open, and so inviting, the American Board and the patrons of the mission wisely increased the number and the facilities of the laborers, and enabled them to put in operation new and systematic measures for raising the qualifications of native teachers, and for training up a future native ministry, by means of boarding schools and a missionary seminary, on a broader scale than in the first years of the mission was practicable, while a nation of unlettered heathen were on the hands of a few, to be instructed in almost everything needful for them to know. During the last year of the laborious and prosperous course of Kaahumanu, soon after Governor Adams succeeded Liliha, the mission put into operation a missionary seminary, at Lahainaluna, under the care of the Rev. L. Andrews. This was opened in September, 1831, with twenty-five young men as pupils. The number, in the course of the year, was increased to sixty-seven. .The scholars, many of them, were married, and had to provide lodgings for themselves and their families, to build their own school-houses, with the direction and aid of the teacher, and raise or procure their own food. But such was their laudable desire to obtain the advantage thus offered, that while pursuing their studies they labored patiently, month after month, the first year, to erect, under every disadvantage, the walls and roof of their school-house. The stones they collected without team, and brought their timber from a distance by human muscle. It was all up-hill work—analogous to that which, for years, had been performed, before an enterprise like this, requiring so much of native energy and hearty coöperation, could be successfully undertaken.

"The object of this seminary was to extend and perpetuate the religion of our Lord Jesus Christ, which the mission had labored, eleven years, to introduce, and to aid in accomplishing its design to secure for the nation the blessings of Christianity and civilization, to disseminate sound knowledge throughout the islands, to train and qualify school-teachers for their respective duties, not only by acquainting them with literature and the knowledge of the arts and sciences most needful for them, but with the proper usages and habits of civilized and Christian life, and eventually to educate young men of piety and promising talents to become

preachers of the Gospel, and ministers of Christ, for the maintenance and dissemination of pure religion among their dying fellow men. The intention of the mission was to allow fifty to enter annually who could pass a respectable examination in reading, writing, mental arithmetic, and topographical geography, and whose age did not exeeed twenty-five years. The proportion of pupils from the different islands was 18 from Hawaii, 14 from Maui, Molokai and Lanai; 10 from Oahu, and 8 from Kauai and Niihau. The period for the course in general was four years. The course of studies, introduced gradually, were, for the first year, Arithmetic, Geometry, Trigonometry, Sacred Geography, Hawaiian Grammar, Langauges to a select class.

"Second Year. Mathematics, embracing Algebra, Navigation, and Surveying, History, Languages for a select class.

"Third Year. Mathematics continued, Natural Philosophy, Church History, Languages for a select class.

"Fourth Year. Astronomy, Chemistry, Moral Philosophy, Church History, Languages for a select class.

"During the whole course, more or less attention, every week, is given to biblical instruction, embracing the interpretation of Scripture, evidences of Christianity, Archeology, and Sacred Geography, Composition and Elocution. Systematic Theology was contemplated, as soon as sufficient advancement and preparation for it should be made. Music, vocal and instrumental, Penmanship, Drawing, Maps, Engraving, Printing, Binding, Carpentry, Turnery, and Mason work, all received some attention, at least, from individuals—connected with needful exercise and profitable labor."

EXTRACT, REPORT OF THE MISSION, 1835, BINGHAM, PGS. 470-472:

"The missionaries and their wives and helpers have, up to the present time, endeavored to cherish the schools as a primary means of reforming the nation. They have had classes under their own immediate instruction, amounting sometimes to not less than 1000 individuals of different ages. But the mass of those who have attempted to learn, embracing those numerous collections of people called schools, in the different parts of the islands, have been under the instruction of incompetent native teachers. The aggregate of learners has, at some periods, amounted to 50,000. Probably more than four-fifths of these were advanced to years of maturity, and not a few beyond middle age. Most of them had their ordinary occupations of life to attend to, as though no schools existed.

While it has been our business to teach a few hundred personally, and superintend their efforts to teach others, our steady aim has been to extend a moral and religious influence over the whole community by means of the widely extended and, in some

respects, loose school system. Whatever may have been the defects of that system, it should be understood that the designs of it has not been merely or mainly literary; that mental culture has not been in the common schools, especially of adults, our most prominent object; for in those points of view, hundreds of schools, under native teachers, embracing thousands of readers, would hardly deserve the name of schools, as that term is ordinarily understood in the most enlightened countries as the nurseries of science and literature. But the general object has been to supply, in some measure, the want of family government and education; the want of a well regulated civil government; to restrain from vice and crime, and to supply amply, by a mild and salutary influence, the want of the power once derived from a horrid superstition. It has afforded, to a great extent, by the pen, slate, pencil, and book, a substitute for the pleasure which the people once derived from games of chance, and of skill, and strength, connected with staking property; and in many cases instruction imparted by dictation and the exercise of joint recitation or cantillation of moral lessons by classes, has been a happy substitute for the heathen song and dance, where ignorance of the value of mental culture, or a want of interest in the subject of education, or the incompetency of the teacher, rendered a severer method of application impracticable. When this easier method of communicating and receiving some knowledge of what we desired to teach has served to enlist the stupid pupils at all, they have been ready to try to learn the art of reading and writing where the means have been supplied. And as these have been acquired by numbers, the desire for books and other studies has been increased beyond our ability to meet it.

"While then we have labored to afford the people the means of learning the arts of reading and writing, geography and arithmetic, for the discipline of mind and the purposes of life, and to facilitate their access to the sacred Scripture, it has been our steady aim to bring to bear constantly on the dark hearts of pagans and their children those moral and evangelical truths, without the presence and possession of which the design of their rational existence cannot be secured. While our school system does indeed contemplate the disciplining of the mind, and affords important means and facilities for it, it has always contemplated chiefly a moral influence over the heart and life which the want of family and civil government, and the want of an adequate number of the preachers of the Gospel, has made indispensable. We have, therefore in our first books, inserted such plain precepts in the science of duty as every reader can understand; and have added evangelical tracts and portions of Scripture as reading lessons for all our schools; and have endeavored to give them an influence similar to that of Sabbath schools, as far as circumstances would allow. And we believe their agency has been, and still is, in that respect, far more indispensable than that of Sabbath schools in the United States or Great Britain."

FROM THE DECLARATION OF RIGHTS AND FIRST CONSTITUTION OF HAWAII,

Granted by Kamehameha III, October 8, 1840.

Thurston's Fundamental Law of Hawaii, pp. 1-2.

"God hath made of one blood all nations of men to dwell on the earth," in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands.

These are some of the rights which He has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression, the earnings of his hands and the productions of his mind, not, however, to those who act in violation of the laws.

God has also established government, and rule for the purpose of peace; .....

CONSTITUTION.

It is our design to regulate our kingdom according to the above principles and thus seek the greatest prosperity both of all the chiefs and all of the people of these Hawaiian Islands. But we are aware that we cannot ourselves alone accomplish such an object—God must be our aid, for it is His province alone to give perfect protection and prosperity. Wherefore we first present our supplication to Him, that he will guide us to right measures and sustain us in our work.

It is therefore our fixed decree,

I. That no law shall be enacted which is at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word. All law of the Islands shall be in consistency with the general spirit of God's laws.

II. All men of every religion shall be protected in worshipping Jehovah, and serving Him, according to their own understanding, but no man shall ever be punished for neglect of God unless he injures his neighbor, or bring evil on the kingdom. .....

FROM STATUTES FOR THE REGULATION OF SCHOOLS.

Chapter 7, Laws 1842, Thurston, pp. 38, 15-41.

The basis on which the kingdom rests is wisdom and knowledge. Peace and tranquility cannot well prevail in the land, unless the people are taught in letters, and in that which constitutes prosperity.

Furthermore, those scholars which attend the Mission Seminary at Lahainaluna, shall be freed from the money tax, and all

public labor of the chiefs, and all scholars that go to school to learn geography, arithmetic, and other higher branches taught in the higher schools, those scholars shall not go to the public labor of the chiefs and land agents till they become eighteen years of age.

FROM THE LAW FOR THE PROTECTION OF THE SABBATH.

Chapter 11, Laws 1842, Thurston, p. 51.

It is a well established fact that a nation cannot enjoy peace nor the people prosper, unless they are taught in morals and religion. Wherefore the Sabbath is of great importance, because on that day the people are extensively taught in those branches. If any one interferes with another in his observance of the day, or if any one disturbs the peace and quiet of the day, he is criminal, he does an injury to the public, and to every individual who is seeking the greatest good. Wherefore it is proper for the laws to give protection to the Sabbath, and to all those who observe the day, lest any one should interfere with the greatest good of the land, by making the day a nullity.

ACT OF JULY 11, 1850, INCORPORATED IN CIVIL CODE.

Civil Code 1859, page 174.

Section 738. Whereas, an arrangement has been made between the Hawaiian Government and the American Board of Commissioners for Foreign Missions, whereby the seminary at Lahainaluna has been ceded to the King's Government, on condition that the Government undertakes its support; and whereas, it is desirable to have some institution, where Hawaiian youth can be properly educated for various occupations, therefore, the arrangement, whereby the seminary of Lahainaluna has been surrendered to the King's Government, is hereby ratified and confirmed, and a reasonable sum shall be appropriated annually out of the public funds, for the support of said seminary, in pursuance of said arrangement.

Section 739. Said seminary shall be under the care and direction of the Board of Education, who shall appoint its teachers, and make rules and regulations, from time to time, for its government, and course of instruction; provided, that such rules and regulations do not conflict with the conditions on which that institution was ceded to the Government, nor with any law of this kingdom. Said Board shall have the care and management of the buildings, premises, apparatus, and all other property belonging to said institution.

Section 740. It shall be the duty of the President of the Board of Education, to include in his report to the Legislature, at each regular session thereof, a statement of the operations and condition of said seminary.

Sections 1, 2, 3 respectively, in Act, July 11, 1850.